

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petitions of )  
DAN TONNEMACHER, NORMAN J. HOLTER, )  
ET. AL. and TOM CHANDLER, ET. AL., )  
for Review of Order No. 6-81-99 of the ) Order No. WQ 82-1  
Lahontan Regional Water Quality Control )  
Board. Our File Nos. A-302, A-302(a), )  
and A-302(b). )  
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BY THE BOARD:

On August 12, 1971, the Lahontan Regional Water Quality Control Board (Regional Board) adopted Order No. 6-71-29 excluding the Kings View subdivision, north of Lake Tahoe, from the sewage export mandate of Water Code Section 13951, providing certain conditions were met. Despite the exemption, no development needing waste discharge requirements has occurred in Kings View. Petitioners wish to obtain waste discharge requirements now or in the near future.

On November 7, 1980, in response to some concerns raised by the Tahoe Regional Planning Agency, the Chief Counsel to the State Water Resources Control Board (State Board) submitted a memo to the Regional Board which concluded that the exemption for Kings View was improperly granted under Water Code Section 13951. The Attorney General issued an opinion on August 20, 1981<sup>1/</sup> disagreeing with the Chief Counsel's interpretation of that section. The

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1. Opinion No. 81-505, 64 Ops.Atty.Gen. 660.

Chief Counsel, on September 23, 1981, transmitted another opinion to the Regional Board through its Executive Officer which refuted the Attorney General's conclusions and which advised the Regional Board that it was not required to follow the Attorney General Opinion.

On October 8, 1981, the Regional Board adopted Order No. 6-81-99. This action rescinded Order No. 6-71-29 and prohibited the issuance of waste discharge requirements for any discharges from septic tanks or other means of waste disposal in the Kings View subdivision.

Petitioners, all owners of lots in the Kings View subdivision, filed timely petitions to review the order.

#### I. BACKGROUND

In 1969, the Legislature added Chapter 12 to the California Water Code. The first two sections of Chapter 12 are relevant to our consideration here:

13950. Notwithstanding any other provision of law, upon any district in the Lake Tahoe Basin providing in any area of the district a sewer system and treatment facilities sufficient to handle and treat any resultant waste and transportation facilities sufficient to transport any resultant effluent outside the Lake Tahoe Basin, the further maintenance or use of cesspools or other means of waste disposal in such area is a public nuisance and the district shall require all buildings from which waste is discharged to be connected with the sewer system within a period of not less than 90 days from the completion of such system and facilities.

13951. Notwithstanding any other provision of law, on or after January 1, 1972, waste from within the Lake Tahoe watershed shall be placed only into a sewer system and treatment facilities sufficient to handle and treat any such waste and transportation facilities sufficient to transport any resultant

effluent outside the Lake Tahoe watershed, except that such waste may be placed in a holding tank which is pumped and transported to such treatment and transportation facilities.

As used in this section "waste" shall not include solid waste refuse.

The further maintenance or use of cesspools, septic tanks, or other means of waste disposal in the Lake Tahoe watershed on or after January 1, 1972, by any person, except as permitted pursuant to this section, is a public nuisance. The occupancy of any building from which waste is discharged in violation of this section is a public nuisance, and an action may be brought to enjoin any person from occupying any such building.

This section shall not be applicable to a particular area of the Lake Tahoe watershed whenever the regional board for the Lahontan region finds that the continued operation of septic tanks, cesspools, or other means of waste disposal in such area will not, individually or collectively, directly or indirectly, affect the quality of the waters of Lake Tahoe and that the sewerage of such area would have a damaging effect upon the environment.

This section shall not be applicable to any area or areas within the Fallen Leaf Lake watershed in the event the regional board for the Lahontan region finds that with the export of toilet wastes by single-family residences or with the export of toilet and kitchen wastes with respect to any commercial properties, the continued use of septic tanks, cesspools, or other means of waste disposal in such area or areas for the treatment and disposal of the remaining wastes, will not, individually or collectively, directly or indirectly, affect the quality of the waters of Lake Tahoe, and that the sewerage of such area or areas would have a damaging effect upon the environment.

This section shall not affect the applicability of Section 13950.

In his memorandum opinion, sent to the Executive Officer of the Regional Board on November 7, 1980, the Chief Counsel to the State Board concluded:

"Exceptions to the mandate of export of waste from the Lake Tahoe watershed may only be considered for those discharges which were taking place via 'septic tanks, cesspools or other means of waste disposal' prior to January 1, 1972. Any outstanding

exemptions which would allow new discharge from on-site disposal systems, such as the exemption for the Kings View subdivision, should be rescinded."

This interpretation of Section 13951 was disputed by the Attorney General. In an opinion requested by Senator Ray Johnson, the Attorney General stated:

"...the sewer system connection requirements of Water Code Section 13951 are inapplicable in areas where newly installed, as well as existing, septic tanks, cesspools, and other means of waste disposal will not affect the quality of the waters of Lake Tahoe and the sewerage of such areas will have a damaging effect upon the environment." (p. 8)

On September 23, 1981, the Chief Counsel forwarded to the Regional Board his response to the Attorney General Opinion. In addition to reemphasizing his interpretation of Section 13951, the Chief Counsel concluded:

"Opinions of the Attorney General are advisory only and should not be followed if they are not supported by valid reasons."

Since he believed that the Attorney General had erroneously interpreted Section 13951, the Chief Counsel advised that the Attorney General Opinion "need not be followed by the regional board."

From the contents of the order and the discussion which preceded its adoption, it is clear that the Regional Board chose to follow the analysis and advice of the Chief Counsel rather than that of the Attorney General.

## II. JURISDICTION

In Order No. 71-31, we declined to consider a petition to review an exemption denial under Water Code Section 13951. We did so because the law does not provide for administrative review of Regional Board action under that section. Nothing has changed in that respect, and we still have no jurisdiction to review petitions based solely upon Section 13951.

In this case, however, we are confronted, not with an exemption denial based solely on Water Code Section 13951, but with a waste discharge prohibition based on Water Code Section 13260 et. seq. That the underlying reasons for the prohibition may derive from the interpretation of Section 13951 in no way undermines our authority to review the order pursuant to Water Code Section 13320(a).

## III. CONTENTIONS AND FINDINGS

1. Contention: Petitioners contend that the Attorney General, and not the Chief Counsel, has properly interpreted Water Code Section 13951. They contend that Kings View is entitled to a continued exemption under Order No. 6-71-29 because septic tanks will not affect the quality of the waters of Lake Tahoe and installing sewers would have a damaging effect upon the environment.

Finding: We find the Opinion of the Chief Counsel to be clear and convincing and Attorney General Opinion No. 81-505 unpersuasive. What is at issue is a simple question of statutory interpretation. The key phrase to be construed is the finding to be made by the Regional Board that "the continued operation of septic tanks...in such area will not...affect the

quality of the waters of Lake Tahoe." Water Code Section 13951 (emphasis added).

Stating that the meaning of the word "continued" is unclear, the Attorney General concluded, based on considerations outside the language of the statute, that septic tanks may be permitted where none was in operation before the effective date of the statutory prohibition. In doing so, the Attorney General offered no explanation of how the meaning of the word "continued" was unclear and construed the statute in such a manner as to give the word no meaning at all.

The statute seems clear to us. The two opinions written by the Chief Counsel leave no doubt that the plain meaning of the statute required the Regional Board to adopt Order No. 6-81-99. The word "continued" refers to ongoing uses in a given area. No septic tank discharges exist in Kings View and none existed on January 1, 1972. Since there was nothing to be "continued" in Kings View, the area is not subject to the exemption criteria of Section 13951 and the prohibition of waste discharge is proper.<sup>2/</sup>

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2. Regional Board Order No. 6-81-99 also contains a finding that sewerage would no longer have a damaging effect on the environment. This finding, if supported by the record, would provide an independent basis for affirming the Regional Board Order. None of the petitions raises the issue whether the finding is supported by the record. Considering the matter on our own motion, we are not satisfied that the record is adequate to support any finding as to whether or not sewerage would be damaging to the environment. Ordinarily, an inadequate record would lead us to remand the matter to the Regional Board to reopen the record and determine whether sewerage would be damaging to the environment. Because we affirm Regional Board Order No. 6-81-99 on alternative grounds, however, a remand is unnecessary.

2. Contention: Petitioner Tonnemacher contends that his activities in reliance on Order No. 6-71-29 give him a vested right to use a septic tank which cannot be rescinded by the Regional Board.

Finding: This argument has been raised only by Mr. Tonnemacher's petition, although Ms. Linde and Mr. Eskind did mention it briefly in their oral presentations to the Regional Board.

The gist of Mr. Tonnemacher's claim is that his activities in obtaining various permits in reliance on Order No. 6-71-29 insulate him from the effects of its repeal. The chronology of events seems to support his contention that he relied on the fact that the Kings View area was exempted from the terms of Water Code Section 13951 by the 1971 Regional Board order. His dealings with the Placer County building department and the Tahoe Regional Planning Agency as well as his contacts with Regional Board staff lend credence to his claim that he believed the law would allow him to use a septic tank.

With the adoption of Order No. 6-81-99, rescinding the 1971 order and prohibiting the issuance of waste discharge

permits in Kings View, Mr. Tonnemacher is prevented from carrying out his plans unless he uses a holding tank or sewer. His position is that the change ought not to affect him because he acquired some sort of vested right by his actions. His theory can best be characterized as equitable estoppel.<sup>3/</sup>

An administrative agency is a creature of statute and only possesses such powers as may be conferred upon it. Thus, our function is to apply the law as it is enacted, exercising discretion only when authorized by law.

Water Code Section 13951 provides for the use of discretion by the Regional Board only under a limited set of circumstances. Since we have already decided that those circumstances do not exist in this case, the opportunity to waive the application of the statute is not afforded us. Therefore, we have no authority to rule on the equitable estoppel issue presented by Mr. Tonnemacher.

#### IV. CONCLUSION

In adopting the waste discharge prohibition in Order No. 6-81-99, the Regional Board relied on the correct interpretation of Water Code 13951. In light of the plain meaning of that section, such a prohibition was the appropriate action to be taken.

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3. Equitable estoppel is the legal theory by which a person's conduct or statement binds him or her with respect to all who reasonably rely on it.

V. ORDER

The order of the Lahontan Regional Board, No. 6-81-99, is, with the exception of the finding regarding the effect of sewerage on the environment, affirmed and the petitions challenging that order are dismissed.

DATED: January 21, 1982

/s/ Carla M. Bard  
Carla M. Bard, Chairwoman

/s/ L. L. Mitchell  
L. L. Mitchell, Vice-Chairman

/s/ Jill B. Dunlap  
Jill B. Dunlap, Member

ABSENT  
F. K. Aljibury, Member

11-11-11

